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A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China

Mark Liang*

Abstract

Counterfeiting and the piracy of consumer goods in China are serious and globally recognized problems. Despite concerns expressed by the US and past efforts, China has been unable to enforce IP rights effectively for decades. As a result, American businesses seeking to sell IP-protected goods in China suffer tens of billions of dollars in losses every year. This Comment aims to determine and assess what measures the US may take to reduce IP infringement in China in the short term. China's weak IP enforcement record is a result of both long-term and short-term causes. Short-term causes (that is, causes that could be remedied within the next five years) include problems with China's nascent judicial system, local protectionism and economic dependence on IP infringement, under-deterrence, market access limitations, and the vagueness of the TRIPS Agreement. However, the various proposals found in existing literature for improving China's IP enforcement record fail to adequately tackle these short-term causes and are therefore unlikely to produce an immediate benefit.

The US should adopt a three-pronged approach to improve China's IP enforcement record. First, the US should file a WTO complaint alleging an Article 63.1 violation. Article 63.1 imposes transparency standards on the adjudicative processes and regulations of WTO member states. Second, the US and China should conclude a bilateral agreement providing incentives for joint ventures between American and Chinese companies. Joint ventures will give Chinese companies an incentive to enforce their IP rights since they will then hold an ownership stake. Third, the US should, either by filing a WTO complaint or through bilateral negotiations, seek to reduce China's current market access barriers. However, because China's IP enforcement problem is largely a result of long-term causes, there may be little the US can

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realistically do to bring about immediate and marked improvement in the effectiveness of China's IP enforcement.

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I. INTRODUCTION

Intellectual property (IP) infringement in China is one of the most pressing problems facing US–China relations. Recent estimates speculate that 86 percent of all IP protected goods sold in China have been counterfeited or illegally copied.¹ Other studies suggest the rate is above 90 percent.² Rampant IP infringement costs key “IP-dependent” sectors of the US economy billions each year. For example, the US software and entertainment industries suffer between \$2.5 and \$3.8 billion in lost sales each year.³ In 2001, China’s State Council estimated the value of all pirated goods in China at \$19 to \$24 billion, accounting for one-fourth of the US–China trade deficit for that year.⁴ China’s weak intellectual property rights (IPR) enforcement problem poses an enormous risk to US companies seeking to do business in China. Without adequate protection of IP, lower-priced unauthorized copies of US companies’ products flood the Chinese consumer market, substituting legitimate and higher-priced copies. China’s weak IPR enforcement also increases the US–China trade deficit (itself a sensitive economic and political issue) because sales of domestically produced counterfeit copies replace sales of legitimate imported copies and because it discourages US companies from exporting goods and services to China. These problems will only multiply in size as the US and China continue to increase bilateral trade and investment⁵ and as the Chinese economy continues to expand.⁶

The US has attempted to remedy the situation over the past two decades. The 1990s were characterized by a pattern of US threats of trade sanctions, with the intent that such sanctions would induce the Chinese government to crack

¹ Chun-Hsien Chen, *Explaining Different Enforcement of Intellectual Property Protection in the United States, Taiwan, and The People’s Republic of China*, 10 Tulane J Tech & Intel Prop 211, 213 (2007). US and Taiwan rates are 21 percent and 43 percent respectively.

² International Intellectual Property Alliance, 2004 Special 301 Report: People’s Republic of China (“IIPA, 2004 Special 301 Report”) 31 (2004).

³ Omario Kanji, *Paper Dragon: Inadequate Protection of Intellectual Property Rights in China*, 27 Mich J Intl L 1261, 1264 (2006).

⁴ Id.

⁵ See US Census Bureau, *Foreign Trade Statistics: Trade in Goods (Imports, Exports, and Trade Balance) with China*, online at <http://www.census.gov/foreign-trade/balance/c5700.html> (visited May 3, 2010).

⁶ See Indexmundi, *China GDP – real growth rate*, online at http://www.indexmundi.com/china/gdp_real_growth_rate.html (visited May 3, 2010).

down on IPR violations.⁷ Such threats typically failed, usually because the US withdrew the threats out of concern over potential retaliatory Chinese measures.⁸ In 2001, China joined the World Trade Organization (WTO).⁹ The WTO and its Dispute Settlement Body (DSB), which is composed of the Dispute Panel (Panel) and the Appellate Body (AB), resolves disputes concerning matters within the scope of WTO agreements.¹⁰ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) covers IP matters.¹¹ As a result of China's membership in the WTO and the WTO's jurisdiction concerning matters of international trade and international IP disputes, any US attempts to tackle China's IPR enforcement problem now require the use of WTO sanctions, rather than unilateral US action.¹² In 2005, the US placed China on its special priority "watch-list" of nations that were failing to meet their WTO obligations.¹³ On August 13, 2007, in response to heavy industry pressure, the US filed a WTO complaint alleging, among other things, that China was in violation of TRIPS Article 61.1, which requires countries to adopt criminal procedures and remedies for IPR protection.¹⁴ On January 26, 2009, the Panel issued its opinion. With respect to the US' Article 61.1 claim, the WTO ruled against the US, concluding that China's existing criminal procedures and remedies were not inconsistent with Article 61.1.¹⁵

⁷ Elizabeth Chien-Hale, *Intellectual Property Aspects of Doing Business in China*, 1626 PLI/Corp 109, 142 (2007).

⁸ *Id.*

⁹ *Id.* at 122.

¹⁰ *Id.* at 143.

¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1197 (1994).

¹² Chien-Hale, 1626 PLI/Corp at 142 (cited in note 7).

¹³ *Id.* at 143.

¹⁴ World Trade Organization, Report of the Panel, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* ("China-IP") ¶ 1.2, WTO Doc No WT/DS362/R (Jan 26, 2009). The US complaint also alleged that (1) Chinese measures limited the ability of Chinese authorities to order destruction or disposal of infringing goods as required by Articles 46 and 59 of TRIPS, and (2) the first sentence of Article 4 of China's Copyright Law is inconsistent with Articles 9.1, 14, 41.1 and the first and second sentences of Article 61 of TRIPS and Articles 5(1) and 5(2) of the 1971 Berne Convention. *Id.* ¶ 3.1.

¹⁵ *Id.* ¶ 8.1. The US did prevail on its other two claims. The Panel found that (1) China's Copyright Law, specifically the first sentence of Article 4, was inconsistent with China's obligations under Article 5(1) of the 1971 Berne Convention, as incorporated by Article 9.1 of TRIPS, and Article 41.1 of TRIPS, and (2) China's customs measures were inconsistent with Article 59 of TRIPS insofar as it incorporated the fourth sentence of Article 46 of TRIPS and it applied only to imports to China.

The US' efforts thus far to induce China to improve its IPR enforcement efforts can best be summarized as a series of tentative measures that have ultimately failed. These measures have been tentative in that the US, aware of the sensitive and important economic relationship it has with China, has not applied trade sanctions and has not as actively sought a WTO remedy as one might expect (and as many US industry representatives have hoped), given the magnitude of the problem. The efforts have ultimately failed. China has not significantly changed its IPR enforcement policies or increased resources towards IPR protection. Statistical measures of China's IPR enforcement record, such as piracy rates or monetary value of lost revenues to US industry, indicate that the situation is only worsening.

This Comment will propose US measures that are most likely to be effective in significantly improving IPR protection in China in the *short-term*, with short-term spanning approximately the next five years. In determining which US measures are most promising, the Comment will make two fundamental assumptions. First, any measures must avoid debilitating US-China diplomatic and economic relations, since this would result in consequences that are in neither the US' nor China's interests. This presumption precludes, for example, the threatened trade sanctions of the 1990s, since trade wars would hinder economic relations and interests. This assumption, however, does not preclude WTO sanctions, even if instigated by a US complaint. Such sanctions—unlike unauthorized unilateral US sanctions—are authorized by the WTO. While China would not welcome having WTO sanctions imposed on it, it is less likely to view such sanctions an illegitimate diplomatic or economic affront. WTO sanctions are more likely to be considered fair game, imposed under a universally agreed-upon and consented-to set of rules. China would also have adequate opportunity to oppose such sanctions through the WTO adjudicative processes. The second assumption is that the broad cause of China's weak IPR enforcement record is a lack of political willpower. IPR enforcement is simply not a major national priority for the Chinese government and industry at present. Over the past two decades China has promulgated statutory IP laws and developed a judicial system and administrative agencies to handle IP matters, all of which appear superficially to meet TRIPS standards. Nevertheless, the judiciary, agencies, and Chinese government have failed to enforce their IP laws effectively. The problem then is not one of lack of legal or financial resources to devote to IPR enforcement, but lack of concern for IPR enforcement.

This Comment is organized as follows. Part II analyzes the specific causes of China's IPR enforcement problem. Part II.A discusses socioeconomic and cultural causes that are likely to be irremediable in the short term. Part II.B discusses logistical or political causes that are more conducive to short-term resolution. Part III assesses US measures, which hold some promise, but are ultimately unlikely to succeed in improving Chinese IPR protections. Part IV

proposes three US initiatives that are likely to improve Chinese IPR enforcement: (1) filing a TRIPS Article 63.1 complaint alleging lack of transparency in China's judiciary and agencies that handle IP matters; (2) reducing market access barriers for US goods that are protected by IP; and (3) striking a bilateral agreement that encourages joint ventures between US and Chinese companies and facilitates IP ownership and enforcement for these joint ventures. Part V concludes and notes that full and effective IP enforcement may be impossible in the short-term because of the socioeconomic conditions in China.

II. CAUSES OF CHINA'S WEAK IPR ENFORCEMENT RECORD

China's weak IPR enforcement record has multiple causes. These causes can be divided into long-term causes—those that likely cannot be resolved in the short-term or within five years—and short-term causes. Long-term causes of China's IPR protection problem relate to socioeconomic or cultural conditions, which necessarily take decades to change. Part II.A discusses long-term causes. Short-term causes of China's IPR protection problem are more logistical or political and can be overcome in a matter of a few years if the Chinese government is willing to take action and allocate more resources towards IP enforcement. Part II.B discusses short-term causes.

A. Causes Without Short-term Solutions

There are three long-term causes of China's IPR enforcement problem: (1) average incomes in China are far lower than in developed countries like the US, thereby increasing demand for cheaper illegitimate copies of IP-protected goods; (2) China is a net importer of IP-protected products and accordingly does not consider IP protection a national priority; and (3) China, due to historical circumstance, is not culturally accustomed to recognizing IPRs. Each of these causes is discussed in detail below.

1. Low average incomes in China.

According to World Bank figures, in 2008, the gross national income (GNI) per capita (a rough measure of average income) in China was \$2,770.¹⁶ By comparison, the average GNI per capita in the US for that year was \$44,970, and the average for Organisation for Economic Cooperation and Development

¹⁶ World Bank, *Gross National Income Per Capita 2008, Atlas Method and PPP* (July 1, 2009), online at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> (visited May 3, 2010).

(OECD)¹⁷ states was \$38,760.¹⁸ Average Chinese incomes are therefore far lower than in developed nations. There is also a significant disparity in wealth between rural and urban residents in China. Rural residents, which comprise 61 percent of the total population,¹⁹ earn approximately one-third the income of urban residents.²⁰ Compounded with China's high savings rate of approximately 30 to 40 percent,²¹ the majority of Chinese workers earn less than one dollar of disposable income per day.

This lack of disposable income means that legitimate copies of IP-protected consumer goods are plainly unaffordable for the vast majority of Chinese. Demand for cheaper counterfeit goods is therefore much higher than demand for more expensive legitimate copies. Until Chinese incomes rise to levels where legitimate copies of IP-protected goods become affordable, there will continue to be a thriving demand for unauthorized copies. Raising average Chinese incomes to OECD levels is not achievable in the short term. It is a decades-long process. Low average incomes are therefore a cause of China's IPR enforcement problem that is not resolvable in the short term.

2. China is a net importer of IP goods and services.

In general, nations that are net importers of IP-protected goods and services are less likely to consider IPR protection as a priority. By contrast, nations that are net exporters of IP-protected goods and services are more likely to consider IPR protection as a priority. In other words, nations that import more IP goods and services than they export, or have an "IP trade deficit," will

¹⁷ Organisation for Economic Cooperation and Development, *OECD country Web Sites*, online at http://www.oecd.org/countrieslist/0,3351,en_33873108_33844430_1_1_1_1,00.html (visited Mar 23, 2010). Member states include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Switzerland, Turkey, the UK, and the US.

¹⁸ Computed by finding arithmetic mean of World Bank figures for all OECD nations. See World Bank, *GNI Per Capita 2008* (cited in note 16).

¹⁹ China-Profile, *Urban and Rural Population in China, 1978 and 2002* (Sept 17, 2005), online at http://www.china-profile.com/data/tab_rurpop_1.htm (visited May 3, 2010).

²⁰ Jason Subler, *China urban-rural income gap continues to widen*, Reuters (Jan 24, 2008), online at <http://in.reuters.com/article/asiaCompanyAndMarkets/idINPEK1715020080124> (visited May 3, 2010).

²¹ *Economists defend China's high savings rate*, China Daily Online (Jan 7, 2009), online at http://www.chinadaily.com.cn/bizchina/2009-01/07/content_7375620.htm (visited May 3, 2010). As a point of comparison, the US savings rate has hovered around 2–3 percent over the past decade. Bureau of Economic Analysis, *National Economic Accounts: Personal Savings Rate* (Mar 26, 2009), online at <http://www.bea.gov/briefm/saving.htm> (visited May 3, 2010).

care less about IPRs than nations that have an “IP trade surplus.”²² This makes intuitive sense. Consider the extreme cases. If nation A owns no IP but reaps the benefits of using IP owned by other nations, then it is not in the interest of nation A to have strong IPR enforcement. In fact, nation A would probably prefer no IPR enforcement since it may then use the IP created by other nations at no cost. If nation B owns IP but uses no IP owned by other nations, then it is in nation B’s interest to have strong IPR enforcement in order to maintain ownership over its IP and to exact income, through sales and licenses, from those other nations who benefit from nation B’s IP.

The foregoing explains why the US, a net exporter of IP,²³ is vigorous in enforcing its IP laws and procedures both at home and abroad. By comparison, China is, by a large margin, a net importer of IP.²⁴ Chinese companies own only 0.03 percent of the IP associated with key technological products in the Chinese market.²⁵ Consequently, IPR protection is not a national priority for China. Until Chinese businesses begin to own IP and thereby develop an interest or stake in enforcing their IP, IPR enforcement will remain inconsequential to the Chinese national interest. Restated, until China reduces its IP trade deficit, one can expect IPR enforcement to remain a problem in China. For Chinese industry to mature to the point where it begins producing nearly as much or more IP than what it imports from foreign nations will likely take decades. China’s IP trade deficit is therefore not a cause of China’s IPR protection problem that is resolvable in the short term.

3. Lack of cultural recognition of IPRs.

The concept of IPRs may be culturally unfamiliar to China.²⁶ Most Chinese may have difficulty understanding how intangible legal property rights can attach to physical objects like books, music, and computer chip technology. It further may seem incomprehensible to most Chinese that violating IPRs by making unauthorized copies of IP-protected goods is a legal and moral wrong punishable by fines, civil damages, and even prison.²⁷ These cultural attitudes

²² William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, Eigentum im internationalen Vergleich 265, 275 (Vandenhoeck & Ruprecht, 1999); Kim F. Natividad, *Stepping It Up and Taking It To The Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 Berkeley Tech L J 469, 500 (2008).

²³ See Peter K. Yu, *The Copyright Divide*, 25 Cardozo L Rev 331, 344–53 (2003) (describing the US’ transition from an IP importer to an IP exporter).

²⁴ Natividad, 23 Berkeley Tech L J at 500 (cited in note 22).

²⁵ Id.

²⁶ Jordana Cornish, Note, *Cracks in the Great Wall: Why China’s Copyright Law Has Failed to Prevent Piracy of American Movies Within Its Borders*, 9 Vand J Enter & Tech L 405, 422–25 (2006).

²⁷ See id at 422–23.

may be a result of China's relatively recent emergence from communism. Private property rights in general have only existed and been respected in the past generation.²⁸ Shifting the cultural attitudes of the Chinese populace will take time and is not something that is achievable in the immediate future.

B. Causes That Are Remediable in the Short-Term

There are five short-term causes of China's IPR enforcement problem. First, China's judicial system is still a work in progress and suffers from problems of transparency and political influence. Second, many local communities in China rely economically on IP infringement and are beyond the effective control of the national government. Third, China fails to adequately deter IP infringement due to underutilization of the criminal justice system and weak administrative sanctions. Fourth, market access limitations on imported IP-protected goods foster the creation of a black market for knockoffs and illegal copies. Fifth, the vagueness of TRIPS prevents the WTO members, the US included, from successfully arguing that China is in clear noncompliance with that agreement. Each of these causes is discussed in detail below.

1. Shortcomings of the Chinese judicial system.

The Chinese judicial system currently suffers from problems that compromise its ability to enforce China's statutory IP laws effectively. Some of these problems are natural symptoms of the relative inexperience of the Chinese judicial system.²⁹ For example, the court system has a shortage of qualified judges and personnel, particularly in the lower courts.³⁰ This is problematic given the complexity of IP cases. IP cases require an understanding of IP laws (which are perhaps not always intuitive), an understanding of economic market conditions affecting IP-protected goods and, in patent cases, an understanding of the relevant technology.³¹ Because of the judiciary's newness, there is a lack of prior case law that can aid courts in interpreting statutory IP law and reduce the judicial cost of deciding cases.

The judicial system also suffers from more idiosyncratic problems that are not inherent to any nascent legal system. The Chinese judicial system lacks

²⁸ See Frank Lin, *Piracy in China: Identifying the Problem and Implementing Solutions*, 14 WTR Currents: Intl Trade L J 83, 84–85 (2005).

²⁹ See Cornish, 9 Vand J Enter & Tech L at 426–27 (cited in note 26); Thomas E. Volper, *TRIPS Enforcement in China: A Case for Judicial Transparency*, 33 Brooklyn J Intl L 309, 327 (2007); Chen, 10 Tulane J Tech & Intel Prop at 245–46 (cited in note 1).

³⁰ See Chen, 10 Tulane J Tech & Intel Prop at 245–46 (cited in note 1); Eric Priest, *The Future of Music and Film Piracy in China*, 21 Berkeley Tech L J 795, 826–27 (2006).

³¹ Priest, 21 Berkeley Tech L J at 826–27 (cited in note 30).

transparency, as most lower court judicial decisions are unpublished.³² This makes it more difficult for litigants to appeal lower court decisions since they are uncertain about why they lost.³³ Lack of disclosure also stifles the development of IP case law. Parties and non-parties are therefore uncertain about what the law is with respect to IP and what their respective rights are. The Chinese judicial system also suffers from corruption and political influence.³⁴ In fact, the judiciary is commonly regarded as an arm or policy-implementing body of the Communist Party, rather than as an independent institution.³⁵ Political considerations, not the rule of law, often decide IP cases. Combining political influence with a lack of transparency and lack of qualified personnel, it is not surprising that the judicial system also suffers from a lack of uniformity in deciding IP cases across and perhaps even within jurisdictions.³⁶

The lack of qualified personnel, precedent, transparency, judicial independence, and uniformity make the Chinese judicial system ineffective as an institution for enforcing IPRs. Moreover, these problems are also endemic to China's administrative IP enforcement bodies, such as the State Intellectual Property Office (SIPO),³⁷ the General Administration of Customs, the State Administration for Industry and Commerce, and the Technical Supervision Bureau.³⁸ If the judiciary and administrative agencies, the very bodies whose role is to enforce IPRs, continue to be plagued by the problems discussed here, then effective IPR protection will not be feasible in China.

2. Local protectionism.

Many local municipalities in China rely on IP infringement for their economic livelihood.³⁹ The same way that state and local governments in the US depend on legitimate businesses for tax revenue and employment of their

³² Volper, 33 Brooklyn J Intl L at 329–30 (cited in note 29); Cornish, 9 Vand J Enter & Tech L at 428 (cited in note 26).

³³ See Volper, 33 Brooklyn J Intl L at 329–30 (cited in note 29); Cornish, 9 Vand J Enter & Tech L at 428–29 (cited in note 26).

³⁴ Volper, 33 Brooklyn J Intl L at 327 (cited in note 29).

³⁵ See id at 328.

³⁶ See id at 331; Priest, 21 Berkeley Tech L J at 826–27 (cited in note 30).

³⁷ See Jeffrey M. Duncan, Michelle A. Sherwood, and Yuanlin Shen, *A Comparison Between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China*, 7 John Marshall Rev Intel Prop L 529, 543 (2008).

³⁸ See Anna-Liisa Jacobsen, *The New Chinese Dynasty: How the United States and International Intellectual Property Laws Are Failing to Protect Consumers and Inventors From Counterfeiting*, 7 Richmond J Global L & Bus 45, 60 (2008).

³⁹ Cornish, 9 Vand J Enter & Tech L at 430 (cited in note 26); Natividad, 23 Berkeley Tech L J at 493 (cited in note 22).

residents, many local governments in China depend on local Chinese businesses whose operations involve production and sale of unauthorized copies of IP-protected goods.⁴⁰ Not surprisingly, it is in the interest of many local governments to prevent effective IPR enforcement in order to protect local businesses, a phenomenon known as “local protectionism.”⁴¹

In addition, local governments in China are highly autonomous.⁴² They are beyond the effective control of the national government.⁴³ As a result, even though the national government has instituted statutory IP law and various enforcement measures, local governments can easily shield local IP-infringing businesses from national regulations.⁴⁴ In other words, even if the national government considers IPR enforcement a national priority, local protectionism and the decentralized power structure of China’s government system may offset any national measures aimed at bolstering IPR enforcement.

3. Under-Deterrence: Underutilization of the criminal system and weak administrative sanctions.

China’s judicial and administrative bodies fail to deter IP infringement adequately.⁴⁵ Businesses and individuals in China who profit from producing and selling counterfeit goods do not regard the risk or magnitude of sanctions from China’s enforcement bodies as sufficiently severe to deter them from IP infringing activity.⁴⁶

The criminal justice system, which provides the most severe remedies for wrongdoers, such as prison and hefty fines, would naturally be considered the most effective means of providing deterrence. China’s criminal justice system does in fact provide severe remedies for IP infringement, including prison sentences of up to seven years.⁴⁷ However, China fails to use its criminal system with sufficient frequency to create deterrence. For example, a 2002 estimate shows that the criminal justice system handled only 1 percent of all IP

⁴⁰ Cornish, 9 Vand J Enter & Tech L at 430 (cited in note 26); Priest, 21 Berkeley Tech L J at 822–24 (cited in note 30).

⁴¹ Priest, 21 Berkeley Tech L J at 822–24 (cited in note 30).

⁴² Id at 823–24.

⁴³ Id.

⁴⁴ Id.

⁴⁵ See Stephanie Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, 45 Am Bus L J 371, 392–93 (2008); Jessica Haber, Note, *Motion Picture Piracy in China: Rated Arrrgh!*, 32 Brooklyn J Ind L 205, 217 (2006).

⁴⁶ See Haber, 32 Brooklyn J Intl L at 217 (cited in note 45).

⁴⁷ Kanji, 27 Mich J Intl L at 1273 (cited in note 3).

enforcement actions in China.⁴⁸ The remaining 99 percent of cases were handled by less punitive administrative or civil proceedings, which cannot impose prison as a remedy.⁴⁹

The underutilization of the criminal justice system in China is a result of high and arbitrary thresholds for what levels of IP infringement qualify as criminal.⁵⁰ Articles 213 to 217 of the Chinese Criminal Code govern criminal procedures and remedies for IP infringement and provide for significant jail sentences upon conviction.⁵¹ Article 213 imposes a maximum prison sentence of not more than three years “if the case is of a serious nature” involving counterfeiting.⁵² A prison term of three to seven years is imposed “for cases of a more severe nature.”⁵³ Article 214 imposes up to three years in prison for “relatively large sales” of counterfeit trademarks and three to seven years is required for “huge” sales.⁵⁴ However, Articles 213 to 217 are vaguely worded such that prior to 2004, Chinese courts, unsure as to what scale of IP infringement qualified as criminal, erred heavily against criminal prosecution.⁵⁵ In December 2004, the Supreme People’s Court⁵⁶ issued a Judicial Interpretation⁵⁷ of Articles 213 to 217 (2004 JI), which set numeric thresholds for what qualified as criminal infringement.⁵⁸ However, the 2004 JI’s thresholds were very high, allowing many large-scale infringement operations to escape

⁴⁸ Jacobsen, 7 Richmond J Global L & Bus at 60 (cited in note 38).

⁴⁹ See Lin, 14 WTR Currents: Intl Trade L J at 92 (cited in note 28); Kate C. Hunter, Comment, *Here There Be Pirates: How China Is Meeting Its IP Enforcement Obligations under TRIPS*, 8 San Diego Intl L J 523, 543 (2007).

⁵⁰ Kanji, 27 Mich J Intl L at 1272–73 (cited in note 3).

⁵¹ Id at 1273.

⁵² Greene, 45 Am Bus L J at 392 (cited in note 45).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id; Kanji, 27 Mich J Intl L at 1272–73 (cited in note 3).

⁵⁶ The Supreme People’s Court is China’s highest court.

⁵⁷ Supreme People’s Court Justice Jiang Zhipei’s website explains what authority the Court has to issue judicial interpretations: “In accordance with legal provisions, the Supreme People’s Court has the authority to give judicial interpretation on the specific application of the law, so as to solve knotty legal issues in dealing with the cases, and to ensure the uniformity in applying the law. The judicial interpretation shall take binding effect and must be observed by all the people’s courts and special people’s courts in China, once it is adopted and announced, subject to decision, by the Judicial Committee of the Supreme People’s Court.” Jiang Zhipei, *Judicial Protection of IPR in China: Supreme People’s Court – People’s Republic of China*, online at <http://www.chinaiprlaw.com/english/courts/court2.htm> (visited May 3, 2010).

⁵⁸ Kanji, 27 Mich J Intl L at 1273–75 (cited in note 3).

prosecution.⁵⁹ Further, by setting formal numeric thresholds, future infringers can avoid prosecution by keeping their activities just below the high thresholds.⁶⁰ In addition, the profit thresholds were measured by the value of the *unauthorized* copies sold, which is far lower than the fair market value of authorized copies,⁶¹ thereby making the profit threshold harder to meet.

In direct contrast to China's criminal system, which provides strong remedies but fails to deter due to underutilization, China's administrative system is amply utilized but fails to deter due to weak remedies.⁶² China's administrative agencies handle over 90 percent of all IP enforcement actions.⁶³ Administrative processes are quick, expedient, and lead to high rates of finding liability.⁶⁴ However, administrative remedies are limited to fines and, at present, these fines are too low to deter IP infringement effectively.⁶⁵ Current fine levels are preset by statute rather than correlated to actual damages. For example, a popular Chinese music download site was sued by three Hong Kong record companies.⁶⁶ The damages awarded to the plaintiffs were a mere \$45,000, substantially less than the profits that plaintiffs could have realized had authorized copies of the music been sold.⁶⁷ In another case, a defendant interior design company lost in a suit and paid only \$32,651 in administrative fines.⁶⁸ By computing damages based on the quantity of pirated products, plaintiffs will most likely see an increase in recovery.⁶⁹ As is, infringers tagged with administrative fines are undeterred from continuing their activities, often

⁵⁹ See *id.* The following table shows thresholds for copyright infringement established by the 2004 JI:

Individuals (# of copies)	Business Units (# of copies)	Profit Gain (RMB)	Punishment (prison)
Over 1,000	Over 3,000	Over 30,000	3 years maximum
Over 5,000	Over 15,000	Over 250,000	3–7 years

⁶⁰ Kanji, 27 *Mich J Intl L* at 1274 (cited in note 3).

⁶¹ *Id.* at 1274–75.

⁶² Jacobsen, 7 *Richmond J Global L & Bus* at 60 (cited in note 38).

⁶³ *Id.*

⁶⁴ See Lin, 14 *WTR Currents: Intl Trade L J* at 92 (cited in note 28).

⁶⁵ *Id.* at 91.

⁶⁶ *Id.* at 93.

⁶⁷ *Id.*

⁶⁸ Lin, 14 *WTR Currents: Intl Trade L J* at 93 (cited in note 28).

⁶⁹ *Id.*

regarding fines as simply part of the cost of doing business.⁷⁰ In sum, China's IPR enforcement problem is partly the result of under-deterrence of IP infringing activity. This under-deterrence in turn is a result of underutilization of the criminal justice system and the inadequate remedies offered by administrative bodies, which handle the vast majority of IP cases.

4. Limited market access for imported goods.

China has instituted an array of market access barriers on imported goods.⁷¹ As of 2004, China imposed the following non-exhaustive list of market restrictions on imported copyrighted works: (1) a lengthy approval process for entertainment software titles; (2) an import quota of twenty films a year; (3) a grant of monopoly to a state-run company, "China Film," for importation and distribution of films; (4) restriction of foreign-television broadcasts to no more than 25 percent of total airtime; and (5) imposition of strong censors on imported music.⁷² These market barriers prevent or delay the entry of legitimate copies of IP-protected goods and services into the Chinese consumer market.⁷³ This creates an unmet demand for imported IP protected goods. Domestic counterfeit and pirated copies fill the resulting gap in supply to meet the unmet demand. Access barriers imposed on legitimate goods also increase their price to consumers if and when they do finally reach the market, at which point cheaper counterfeit copies dominate the market.

5. Vagueness of TRIPS Agreement language.

TRIPS Articles 41 and 61 address IPR enforcement. Both provisions are vaguely worded.⁷⁴ Article 41, which addresses enforcement standards generally, contains crucial yet indefinite terms such as "effective action" and "expeditious remedies."⁷⁵ TRIPS does not define or clarify either term. Article 61, which addresses criminal enforcement, contains similarly indefinite terms such as "commercial scale" and "sufficient to provide a deterrent."⁷⁶ The TRIPS agreement, particularly in these two articles, reads more as a statement of broad principles rather than a code of rules and regulations. Consequently, it is difficult

⁷⁰ Haber, 32 Brooklyn J Intl L at 217 (cited in note 45); Jacobsen, 7 Richmond J Global L & Bus at 60 (cited in note 38).

⁷¹ IIPA, 2004 *Special 301 Report* at 46-49 (cited in note 2).

⁷² Id.

⁷³ Id.

⁷⁴ Volper, 33 Brooklyn J Intl L at 337 (cited in note 29). See Donald P. Harris, *The Honeymoon is Over: Evaluating the United States' WTO Intellectual Property Complaint Against China*, 32 Fordham Intl L J 96, 143 (2008).

⁷⁵ TRIPS, Art 41.1 (cited in note 11).

⁷⁶ Id, Art 61.

for the US to prevail in a WTO complaint alleging that China is in noncompliance with TRIPS' enforcement provisions. The flexibility of the language in Articles 41 and 61 allows China to assert that its procedures and remedies comply with the broad standards laid out by TRIPS, though piracy and enforcement data would indicate otherwise. Without the external threat of WTO sanctions, China has less incentive to strengthen IPR enforcement.

III. PROPOSED MEASURES THAT ARE UNLIKELY TO IMPROVE CHINA'S IPR ENFORCEMENT

In response to China's weak IPR protection record, US government officials, business representatives, and academics have proposed various measures that may induce China to improve its enforcement efforts. Parts A through C of this Part review proposals that merit consideration but will likely fail to improve IPR enforcement in China significantly in the short term. Part D presents a proposal not previously found in the literature, filing a WTO complaint based on China's noncompliance with TRIPS Article 3.1. An explanation of each proposal, its merits, and reasons for its ultimate failure follows.

A. File a WTO Complaint Alleging China is Violating TRIPS Article 61

Addressing China's underutilization of its criminal justice system,⁷⁷ the US could file a WTO complaint alleging China's noncompliance with Article 61.1. The US would allege that Articles 213 to 217 of China's Criminal Code and the 2004 JI set arbitrary and exceedingly high thresholds that permit "commercial scale" IP infringement to occur, violating the first sentence of Article 61.1.⁷⁸ Further, because China underutilizes criminal procedures and remedies to enforce IPR's, these procedures and remedies fail to act as a "deterrent" as required by the second sentence of Article 61.1.⁷⁹ If the US ultimately prevails on this claim, China would likely eliminate numeric thresholds and ease requirements for what qualifies as commercial scale IPR infringement. This should result in a large increase in criminal prosecutions enforcing IPRs. A

⁷⁷ See Part II.B.3.

⁷⁸ TRIPS, Art 61.1 (cited in note 11). The first sentence provides: "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale." *Id.*

⁷⁹ *Id.* The second sentence provides: "Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." *Id.*

greater proportion of IPR cases, previously dealt with by administrative and civil remedies, would then be subject to potential criminal sanctions, including prison. This should increase the deterrent effect of criminal remedies.

This proposal is unlikely to succeed because it has been attempted and failed. As mentioned in Part I,⁸⁰ the US filed a WTO complaint on August 13, 2007, alleging among other things that China was in noncompliance with Article 61.1.⁸¹ The Panel rejected the US' Article 61.1 allegation (though as explained above, the US did prevail on its other two claims), finding that China's criminal procedures and remedies were not inconsistent with the requirements of Article 61.1.⁸² However, the Panel's decision does not close the door to a successful future Article 61.1 complaint. In fact, the Panel agreed with the US' broader interpretation of "commercial scale."⁸³ The Panel's disposition was based on a finding that the US had failed to meet its burden of proof in showing that China was failing to remedy and address IP infringement on a commercial scale.⁸⁴ The US was unable to present sufficient evidence in support of its contention that China was underutilizing its criminal system.⁸⁵ The decision suggests then that if the US presented stronger evidence, it would prevail on its complaint. This inference might be overly optimistic, however. More likely, the real rationale underlying the Panel's decision is that language of Article 61.1 is intentionally vague and open-ended. The WTO would prefer to avoid making definitive rulings on compliance with Article 61.1's requirements.⁸⁶ So long as China provides some avenue of criminal IPR enforcement, the WTO is unlikely to find a TRIPS violation.

B. Force WTO Members to Pay Dues To The IPR Enforcement Fund

The WTO could require member states to pay into an "IPR enforcement fund" through annual membership fees.⁸⁷ The fund's proceeds would then be distributed to China and other member states that have poor IPR enforcement

⁸⁰ See Part I.

⁸¹ *China-IP*, ¶ 3.1 (cited in note 14).

⁸² *Id.*, ¶ 8.1. See note 15 (noting the US did prevail on its other two claims).

⁸³ *Id.*, ¶ 7.481 (observing that China argued that "commercial scale" refers only to IP infringing activity on a large enough scale, while the US interpreted "commercial scale" to include IP infringing activity occurring on a large scale as well as any IP infringing activity aimed at profit, regardless of scale). The Panel agreed with the US interpretation. *Id.*, ¶¶ 7.565, 7.576–7.578.

⁸⁴ *Id.*, ¶¶ 7.667–7.669.

⁸⁵ *China-IP*, ¶¶ 7.667–7.669 (cited in note 14).

⁸⁶ See Harris, 32 *Fordham Intl L J* at 144, 156 (cited in note 74).

⁸⁷ Haber, 32 *Brooklyn J Intl L* at 226 (cited in note 45).

records.⁸⁸ The distribution of funds would be conditioned on their use for IPR enforcement purposes. For example, the money could be used for increasing seizure and confiscation efforts, hiring and training judicial and administrative agency personnel to handle IPR cases, and defraying the costs of judicial and administrative proceedings. Such a proposal would likely preclude China (and other recipient nations) from raising an Article 41.5 defense on grounds that their IPR enforcement efforts are justifiably inadequate due to lack of resources.⁸⁹

Creation of such a fund is entirely consistent with the policies and practices of TRIPS and the WTO. In particular, Articles 66 and 67 recognize that signatory developing nations may currently lack the resources to comply fully with substantive TRIPS provisions and may require technical and financial assistance in satisfying their obligations.⁹⁰ More generally, the WTO has, as a matter of course and historical practice, provided developing countries with technical and financial assistance in order to further trade liberalization and assist in the costs of implementing WTO obligations.⁹¹ For example, prior to the creation of the WTO, GATT technical assistance took the form of “trade policy courses” taught in Geneva.⁹² In September 1995, the WTO launched a \$2.5 million fund for technical assistance for least-developed countries and in December 1996, the WTO announced a collaboration between six international agencies (including the International Monetary Fund and World Bank) and bilateral donors to ensure greater coherence in assistance.⁹³ More recently, as part of the Doha round, the Doha Development Agenda Global Trust Fund was created for the purposes of “capacity building,” with an initial pledge of CHF 21.5 million.⁹⁴ Inducing developing nations to comply with international obligations through capacity-building and international cooperation rather than

⁸⁸ Id at 227.

⁸⁹ TRIPS, Art 41.5 (“It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”) (cited in note 11).

⁹⁰ Id, Arts 66–67 (cited in note 11). See also Duncan Matthews and Viviana Munoz-Tellez, *Bilateral Technical Assistance and TRIPS: The United States, Japan, and the European Communities in Comparative Perspective*, 9(6) J World Intel Prop 629, 629–30 (2006).

⁹¹ Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 Wis Int L J 643, 651 (2005).

⁹² Id at 657.

⁹³ Id at 657–58.

⁹⁴ Id at 660.

sanctions and confrontational tactics finds foundational support in *The New Sovereignty: Compliance with International Regulatory Agreements*,⁹⁵ a seminal work on international compliance.⁹⁶ An IPR enforcement fund would therefore not be an unusual or controversial proposal, but a standard approach to resolving capacity constraints encountered by developing nations.⁹⁷

Despite its merits, this proposal is objectionable for three reasons. First, the proposal faces logistical or practical problems. The WTO would have to decide which member states are entitled to the fund's proceeds and how much. After disbursement, the WTO would have to monitor recipient nations to ensure that the funds are being spent on IPR enforcement. Second, paying China to improve its IPR enforcement would indirectly recognize that China is in noncompliance with TRIPS. The "fairer" solution then might just be for the WTO to require China to comply with TRIPS rather than rewarding China for noncompliance, thereby creating a moral hazard problem. Third, lack of financial resources is not among the causes of China's IPR protection problem.⁹⁸ China has the financial wherewithal to enforce IPRs effectively. However, China simply does not regard IPR enforcement as a national priority worthy of devoting resources.⁹⁹ Hence, paying China to enforce IPRs is unlikely to result in significant improvement. In fact, given that the funds are conditional, it is possible that China would not accept them.

⁹⁵ Consider Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard 1995).

⁹⁶ See William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 NC J Intl L & Comm Reg 379, 388–89 (2004); W. Bradnee Chambers, *Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties*, 16 Georgetown Intl Envir L Rev 501, 509 (2004).

⁹⁷ Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 Tulane L Rev, 843, 852 (2002) ("In fact, capacity-building has become so central to international environmental diplomacy that many developing countries, who may be particularly lacking in capacity, are demanding that, before they make any multilateral commitments, developed nations must commit to the provision of financial resources and technical transfer.").

⁹⁸ Consider Part II. Lack of financial resources is not among the listed causes of China's IPR enforcement problem.

⁹⁹ Wei Shi, *Incurable or Remediable? Clues to Undoing The Gordian Knot Tied By Intellectual Property Rights Enforcement in China*, 30 U Pa J Ind L 541, 577–78 (2008); Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 Ohio N U L Rev 203, 224 (2006); Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 NC J Intl L & Com Reg 665, 701 (2006); See Cornish, 9 Vand J Enter & Tech L at 408 (cited in note 26).

C. Amend TRIPS To Clarify Enforcement Standards

TRIPS Article 71 permits the Council for TRIPS¹⁰⁰ to “undertake reviews [of TRIPS] in the light of any relevant new developments which might warrant modification or amendment of the Agreement.”¹⁰¹ Under this proposal, the US would use Article 71 to request that the Council amend Articles 41 and 61.¹⁰² Specifically, the language of those enforcement provisions should clarify what constitutes “effective action,” “commercial scale,” and “deterrent.” The amendments may go so far as to specify quantitative metrics for compliance. Such metrics could include maximum piracy rates, threshold guidelines for commercial scale, and minimum penalties.¹⁰³

This proposal is objectionable for four reasons. First, amending TRIPS in such a manner would constitute prescribing the rules of decision. Because China is not in clear violation of current TRIPS provisions, the US would be amending the provisions such that China will be in clear violation. More importantly, the amendments would violate one of the underlying assumptions of this paper, that any US measures should not negatively affect US-China relations.¹⁰⁴ Second and related to the first point, the Council is unlikely to amend TRIPS solely upon the US’ request. The “new developments which might warrant modification” language suggests that amendment should be pursuant to a broad multilateral consensus on the need for amendment of TRIPS. The US is likely to face fierce opposition from China and many developing member nations against instituting amendments. The US is therefore unlikely to succeed in getting their requested amendments passed. Third, whatever quantitative metrics are included in the amendments may be arbitrary and prone to circumvention. For example, an amendment placed a ceiling of 30 percent on piracy rates. The 30 percent bar might seem arbitrary as a level where IPR enforcement is deemed effective. China could step up enforcement such that piracy rates were 29 percent but no lower. Alternatively, China could manipulate its figures to show lower piracy rates satisfying the specified threshold. Fourth, WTO member states, including the US and EU, increasingly regard TRIPS as a statement of principles rather

¹⁰⁰ The WTO’s website defines the Council for TRIPS as “the body, open to all members of the WTO, that is responsible for administering the TRIPS Agreement, in particular monitoring the operation of the Agreement.” World Trade Organization, *Work of the TRIPS Council*, online at http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm (visited May 3, 2010).

¹⁰¹ TRIPS, Art 71 (cited in note 11).

¹⁰² See Haber, 32 Brooklyn J Intl L at 225 (cited in note 45).

¹⁰³ Id.

¹⁰⁴ See Part I.

than as a strict code of rules and regulations.¹⁰⁵ Amending TRIPS to include requirements that are more specific would run counter to this international consensus and be widely opposed by member states.

D. File a WTO Complaint alleging China is Violating TRIPS Article 3.1

Article 3.1 of TRIPS articulates the national treatment principle.¹⁰⁶ The national treatment principle bars member states from implementing policies that discriminate or provide less favorable treatment to foreign parties relative to domestic parties.¹⁰⁷ The US could file a WTO complaint alleging that China is in noncompliance with TRIPS Article 3.1. The complaint could make two allegations. First, China's market access restrictions on imported IP-protected goods¹⁰⁸ constitute discriminatory taxation and regulation of US IPRs. Second, the Chinese judicial system exhibits more vigorous enforcement of IPRs held by domestic Chinese parties than foreign US parties. For example, the US might present statistics demonstrating higher seizure rates, higher fines and penalties, higher rates of finding liability (in civil and administrative proceedings) or guilt (in criminal proceedings) when Chinese IPRs are being asserted than in cases involving US IPRs.

Each of the two allegations of such an Article 3.1 complaint runs into problems. The first allegation, which relates to import restrictions and tariffs, is probably not within the purview of the TRIPS agreement. TRIPS is directed at recognition and enforcement of IPRs.¹⁰⁹ It requires member states to implement IP laws and create institutions and mechanisms for enforcement of those laws. It does not relate to broader issues of regulation and taxation of goods and industries, which fall under the purview of another WTO statute, the General Agreement on Tariffs and Trade (GATT).¹¹⁰ Therefore, if the US seeks to file a complaint alleging China's violation of the national treatment principle, it is unlikely to succeed if the complaint is based on Article 3.1 of TRIPS. It should

¹⁰⁵ See Marco Ricolfi, *Is There An Antidote Against IP Overprotection Within TRIPS?*, 10 Marq Intel Prop L Rev 305, 325–26 (2006).

¹⁰⁶ TRIPS, Art 3.1 provides, "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . ." (cited in note 11).

¹⁰⁷ World Trade Organization, *Principles of the Trading System*, online at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (visited May 3, 2010).

¹⁰⁸ See Part II.B.4.

¹⁰⁹ TRIPS, Art 1, 2 (cited in note 11); Chien-Hale, 1626 PLI/Corp at 142 (cited in note 7).

¹¹⁰ See World Trade Organization, *GATT and the Goods Council*, online at http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (visited May 3, 2010).

instead file a complaint based on one of the sub-provisions of Article III of GATT, which articulates the national treatment principle for that WTO statute.

The second allegation is unlikely to succeed because of problems of proof. Favoritism of domestic parties, at least in IPR cases, is not a known characteristic of the Chinese judiciary. However, concerns of local protectionism¹¹¹ and political influence over the judiciary¹¹² intimate the possibility of “home-state” advantage. Given the Chinese judiciary’s lack of transparency though, collecting enforcement statistics sufficient to make a case for discrimination will be problematic. Further, in light of *China-IP*, where the Panel found against the US’ Article 61.1 claim because of inadequate proof,¹¹³ the WTO is likely to place a high evidentiary bar for a showing of discrimination sufficient to violate Article 3.1. The US would have to provide comprehensive statistics demonstrating an incontestable and substantial gap in enforcement outcomes to succeed on its Article 3.1 complaint. Despite this paper’s skepticism, this proposal is worthy of investigation. The US should attempt to collect statistics on China’s seizure rates and judicial and administrative outcomes in IPR cases. If there is a substantial gap in enforcement of US-owned IPRs as compared to domestically owned IPRs, then a TRIPS Article 3.1 complaint may succeed. This Comment contends only that such statistics may be difficult if not impossible to compile and that such a gap in enforcement is not likely to exist.

E. IPR Education and Training Programs

The US may provide IPR training to Chinese government officials, SIPO staff, members of the Chinese judiciary, and possibly the Chinese business community.¹¹⁴ Training would focus on the importance of IPRs for economic growth and present enforcement techniques.¹¹⁵ For example, the US might send Patent and Trademark Office (PTO) officials to China to explain how to adjudicate various common IPR infringement cases, explaining how to apply IP laws to given fact patterns and what remedies are appropriate. Providing training should remedy problems discussed on Part II relating to shortcomings of

¹¹¹ See Part II.B.2.

¹¹² See Part II.B.1.

¹¹³ *China-IP*, ¶¶ 7.667–7.669 (cited in note 14).

¹¹⁴ See Hunter, 8 San Diego Intl L J at 548 (cited in note 49); Cornish, 9 Vand J Enter & Tech L at 432 (cited in note 26).

¹¹⁵ Cornish, 9 Vand J Enter & Tech L at 432 (cited in note 26).

China's judiciary, particularly judicial competence and prevailing cultural attitudes with regard to IPRs.¹¹⁶

This proposal should be implemented. It is low-cost, can only help to improve China's IPR protection capabilities, and ameliorates US-China relations. It is, however, unlikely to succeed in bringing about significant *short-term* improvement in China's IPR enforcement. Creating a competent judiciary is a decades-long process. It requires building up case law and developing a legal education system. Having US representatives provide pointers will not perceptibly speed up the process. In addition, the shortcomings of China's judiciary extend beyond mere competence; as Part II.B.1 discussed,¹¹⁷ they include issues of corruption that IPR training would not resolve. More to the point, China's weak IPR enforcement is primarily the result of lack of willpower. China simply does not regard IPR enforcement as a national policy concern. Because broader policy concerns influence judicial and administrative decisions in many cases, and because political forces that do not consider IPR enforcement a priority affect the Chinese judiciary, incremental improvements in judicial competence are unlikely to provide significantly stronger IPR protection.

IV. A THREE-PRONGED APPROACH: US ACTIONS WHICH SHOULD IMPROVE CHINA'S IPR ENFORCEMENT IN THE SHORT-TERM

Three US measures are likely to succeed in inducing China to improve its IPR enforcement in the short-term. First, the US should file a WTO complaint alleging China is in noncompliance with TRIPS Article 63.1, which places transparency requirements on member states' IP adjudication bodies. Second, the US should negotiate with China to reduce or eliminate existing market access barriers on US IP-protected goods. Third, the US should execute a bilateral agreement with China which encourages joint US-China business ventures and facilitates IP ownership and protection for these joint ventures. The US should carry out these three measures as a single unified course of action. Each proposal is assessed below.

A. File an Article 63.1 Complaint with the WTO

The US should file a WTO complaint alleging China's noncompliance with Article 63.1 of TRIPS with the WTO.¹¹⁸ Article 63.1 provides:

¹¹⁶ See Part II.

¹¹⁷ See Part II.B.1.

¹¹⁸ Volper, 33 Brooklyn J Intl L at 340-42 (cited in note 29); Cornish, 9 Vand J Enter & Tech L at 428-29 (cited in note 27).

Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.¹¹⁹

Article 63.1 places disclosure requirements on the judiciary of member states.¹²⁰ Countries are obligated to publish judicial and administrative decisions that pertain to IPRs.¹²¹ Unlike Articles 41 and 61, Article 63.1 does not just state broad principles but enunciates a more exacting rule. As discussed in Part II.B.1, China's judiciary currently suffers from a lack of transparency.¹²² At present, there is no comprehensive and searchable system for Chinese judicial decisions.¹²³ The Supreme People's Court publishes a Gazette of judicial decisions. However, the Gazette is highly edited and contains only a select proportion of all lower court decisions.¹²⁴ China's current disclosure practices therefore fail to meet the requirements of Article 63.1. Given Article 63.1's lucid requirements, the US should therefore prevail on an Article 63.1 claim. The WTO will then require China to bring its judicial and administrative disclosure practices into compliance with Article 63.1.

Note that an Article 63.1 claim does not *directly* tackle China's weak IPR record. In contrast to Article 41 or 61 claims, an Article 63.1 claim does not state that China's IPR enforcement regime is inadequate and fails to comply with more substantive TRIPS provisions, such as Article 41 or 61. Rather, an Article 63.1 claim addresses technical or procedural flaws in China's enforcement regime, namely lack of transparency. This indirectness is likely why the US has not already attempted this approach. Nevertheless, improved transparency should improve China's IPR enforcement in the short-term for three reasons.

First, with all judicial and administrative decisions subject to publication, "what the law is" in China with respect to IPRs will become clearer to litigants and courts. Litigants will develop expectations of what their legal rights are and adjust their behavior accordingly, taking preventive measures to protect their IPRs in situations where courts are known to disfavor strong IPR protection and relying more on adjudication in situations where courts are known to favor strong IPR protection. Judges and administrative panels will have a larger and

¹¹⁹ TRIPS, Art 63.1 (cited in note 12).

¹²⁰ Volper, 33 Brooklyn J Intl L at 313 (cited in note 29).

¹²¹ Id.

¹²² See Part II.B.1.

¹²³ Volper, 33 Brooklyn J Intl L at 329 (cited in note 29).

¹²⁴ Id.

more complete supply of precedent from other jurisdictions from which to decide their cases. As a result, one can expect IPR cases to be decided more accurately, with greater competence and an increased uniformity of results. In sum, bringing transparency up to Article 63.1 standards should bolster the clarity and rule of law in China. The result is increased judicial uniformity and competence and hence, more effective IPR enforcement. Finally, bolstering the rule of law reinforces the authority of courts to decide cases, thereby countering the undesirable influences of local protectionism and political forces.

Second, more transparency will also result in increased scrutiny of Chinese judicial and administrative agency rulings. Aware that their decisions are publicly available and subject to review from higher courts, the central government, and even other WTO states, judges and administrative panels may feel pressured to “get it right.” The Chinese judiciary, particularly lower courts, will be far more inclined than they are presently, when their decisions are rarely disclosed and scrutinized, to adjudicate their cases in full compliance with precedence and statutory IP law. Greater transparency should therefore result in a “race to the top” whereby Chinese courts, aware that their decisions are accountable to stringent review and with greater insight into how other Chinese courts are adjudicating IP cases, compete to reach the most correct and just results. This should further reinforce the rule of law in IPR cases, thereby increasing judicial uniformity and competence and lessening the effects of local protectionism and political interests.

Third, if all judicial and administrative rulings concerning IPRs are published, this should give the US ammunition to prevail on a substantive TRIPS Article 41 or 61 claim in the future. Presently, the Chinese judiciary’s lack of transparency makes it difficult for the US to collect sufficient evidence to prove China is in noncompliance with TRIPS’ enforcement provisions.¹²⁵ Without access to comprehensive records of judicial and administrative rulings, the US cannot prove that China’s enforcement bodies are failing to meet TRIPS obligations. If China increased disclosure to meet Article 63.1 standards, this problem would be resolved. The US could compile complete and accurate data on China’s enforcement efforts. The US could then mine the data for evidence of China’s noncompliance with other TRIPS provisions. The US might look for evidence that the Chinese judiciary systematically disfavors protecting IPRs held by foreign parties in violation of Article 3.1.¹²⁶ The US might check whether China’s civil courts consistently rule in favor of defendants in IP infringement suits where the law and facts would suggest the opposite result in violation of

¹²⁵ See, for example, *China-IP*, ¶¶ 7.620–7.652 (suggesting that the evidentiary burden for proving a violation of one of TRIPS’ enforcement provisions is very high) (cited in note 14).

¹²⁶ See Part III.D.

Article 41. The US might also observe whether China's criminal courts frequently fail to prosecute IP infringement occurring on a "commercial scale" in violation of Article 61. In sum, prevailing on an Article 63.1 claim will give the US the evidentiary support to do what it cannot do presently—prevail in a WTO dispute concerning China's noncompliance with a substantive TRIPS provision.

There is limited WTO case law concerning Article 63.1. Thus, its precise requirements are unclear. The only WTO case presenting an Article 63.1 claim is *India–Patent*.¹²⁷ In that case, the US filed a complaint alleging that India's administrative procedures for processing pharmaceutical and chemical patent applications failed to comply with Article 70.8.¹²⁸ In the alternative, the US filed a claim based on Articles 63.1 and 63.2.¹²⁹ The US argued that even if India had in place an administrative process that complied with Article 70.8, India has not made this process transparent. India thereby violated the judicial transparency requirements imposed by Articles 63.1 and 63.2.¹³⁰ The dispute turned on whether the US could bring an Article 63 claim as an alternative claim (alternative to its Article 70.8 claim). India argued that Article 63.1 only applied to scrutinize procedures that were already found to comply with TRIPS.¹³¹ That is, Article 63.1 only imposes notice and transparency requirements on procedures that were already consistent with TRIPS. The Panel disagreed, concluding that Article 63 imposed transparency requirements on any IP-related procedures.¹³² The Panel ultimately ruled for the US, finding India had failed to adequately disclose the operation of its administrative process for approving pharmaceutical patents.¹³³ India had taken no action to publicize its procedures to the WTO or its member states. India defended its Article 63 compliance by noting that a written answer to a question in India's Parliament mentioned its administrative system for processing patents. The Panel found this form of publication plainly inadequate for Article 63.1 purposes.¹³⁴ The Appellate Body later reversed the Panel's ruling on procedural grounds. The Appellate Body found that the US had never included an Article 63 claim in its original request

¹²⁷ World Trade Organization, Report of the Panel, *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India–Patent"), WTO Doc No WT/DS50/R (Sept 5, 1997).

¹²⁸ Id., ¶ 3.1(a)–(b).

¹²⁹ Id., ¶ 3.1(c).

¹³⁰ Id., ¶ 6.7.

¹³¹ *India–Patent*, ¶ 6.7 (cited in note 127).

¹³² Id., ¶ 6.8.

¹³³ Id., ¶¶ 7.44–50.

¹³⁴ Id., ¶ 7.48.

for a Panel or in its original written complaint, and therefore, the Panel was without jurisdiction to rule on Article 63.¹³⁵

Although *India-Patent* provides few details on Article 63.1's requirements, the Panel's decision does provide a few small lessons. First, Article 63 claims can be brought as an alternative claim to an allegation based on a more substantive TRIPS provision. In *India-Patent*, the US' substantive allegation was that India's administrative patent review procedures failed to comply with Article 70.8. In the alternative, the US brought an Article 63 claim, arguing that India had failed to disclose its procedures. The Panel found this tactic perfectly acceptable; the Appellate Body reversed only because the US had not tacked on its Article 63.1 claim in a timely manner. Applied here, the US could bring an Article 63.1 claim as an alternative claim in a broader WTO complaint. For example, the US could file a complaint alleging that China's administrative penalties are inadequate in violation of Article 41 and alongside it, an Article 63.1 claim seeking disclosure of historical penalty amounts and standards used to determine penalty amounts. Second, the Panel's ruling suggests that *internal* disclosure is insufficient to satisfy Article 63.1. Documents exchanged within India's parliament did not provide the transparency contemplated by Article 63.1. Applied here, if China's IP rules, regulations, and decisions are disclosed only through published documents internal to the Chinese government, this would be regarded as insufficient. China must make its IP laws and rulings easily accessible to other WTO member states and private parties.

China's compliance with Article 63 was disputed in October 2005. The US filed a request, pursuant to Article 63.3, with China seeking detailed information from China on its IPR enforcement efforts over the last four years.¹³⁶ Article 63.3 requires member states to respond to requests for information regarding IP rules, regulations, and decisions, including turnover of documents relating to specific adjudications.¹³⁷ In the request, the US asked for information regarding specific IP piracy cases, methods of resolution, the nature of remedies, and the various products the IP piracy cases affected. For China's convenience, the US

¹³⁵ See World Trade Organization, Report of the Appellate Body, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc No WT/DS50/AB/R, ¶¶ 85–96 (Dec 19, 1997).

¹³⁶ Konstantina K. Athanasakou, *China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS*, 39 *Georgetown J Intl L* 217, 224 (2007).

¹³⁷ "Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements." TRIPS, Art 63.3.

cited specific documents, provided examples of possible responses, and allowed flexibility as to how China could respond with statistical information.¹³⁸ China refused to respond to the US' request, claiming that it had fulfilled its transparency obligations by making the information on relevant cases and enforcement of IPR legislation publicly available.¹³⁹ China also added that the request failed to specify whether the request was based on Article 63.1 or 63.2. China also argued that 63.3 imposed no obligation to honor a request.¹⁴⁰ In response, the US stated that China's response provided insufficient information.¹⁴¹ Chinese commentators disagreed, alleging that the US' request did not meet the request requirements of Article 63.3. In particular, the US' request for all IP cases between 2001 and 2004 failed to comply with Article 63.3's requirement that a request relate to a "specific case."¹⁴²

Given this episode's focus on the technicalities of Article 63.3 requests, the spat provides few answers to the issue of whether China is actually in compliance with Article 63.1. On the one hand, China's response partly argued that all its IP rules and decisions were already publicly available. On the other hand, the US was requesting data and documents that China plainly had not made available. China's refusal to respond as requested and its resort to technicalities to deflect the US' requests suggests China's noncompliance. Of course, China legitimately may have considered the US' requests as a diplomatic power play, an abuse of Article 63.3. The costs of forming an adequate response may have been large and some of the requested information may have been confidential. Regardless, this episode says little about the prospects of US success in a formal WTO Panel dispute concerning China's Article 63.1 compliance. Further, these events may unfortunately indicate that even supposing a US victory, with the WTO finding China's judicial and legal transparency inadequate, China will still refuse to materially improving disclosure of its IP rules and decisions. That is, the US may win the WTO dispute, but the victory will be a hollow one with no real effect.

This proposal is not without other potential failings. Increased transparency may not result in immediate short-term improvement in IPR enforcement. It may take longer than five years for China to increase transparency and establish searchable and comprehensive systems of disclosure that meet Article 63.1 requirements. Moreover, given that the Chinese

¹³⁸ Kanji, 27 Mich J Intl L at 1282 (cited in note 3).

¹³⁹ Athanasakou, 39 Georgetown J Intl L at 234 (cited in note 136).

¹⁴⁰ Kanji, 27 Mich J Intl L at 1282 (cited in note 3).

¹⁴¹ See id; Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 Berkeley Tech L J 867, 917 (2008).

¹⁴² Athanasakou, 39 Georgetown J Intl L at 234 (cited in note 136).

government does not regard IPRs as a national priority and the government's influence over the judiciary, Chinese courts may feel no pressure from above to enforce the rule of law in IPR cases. It is possible then that despite disclosure requirements, Chinese courts and administrative panels will not be responsive and improve adjudication. On the other hand, if Chinese courts and agencies continue to prove ineffective, the US could then file an Article 41 or 61 claim. However, it may be more than five years before the US can collect enough data to make a sufficiently strong evidentiary showing in support of its claims. In addition, increased transparency may not result in significant improvement in IPR enforcement as it does nothing to resolve other short-term causes of China's weak enforcement. For instance, the proposal does not address local protectionism. Local economies and governments will still rely on IP infringement and likely take actions to insulate infringing businesses and individuals from enforcement actions. The proposal also does not address market access restrictions that China places on imported IP goods. Fortunately, the next two proposals do squarely address market access barriers and local protectionism. Applying the three proposals together as a single course of action may then provide significant and immediate improvement in China's IPR enforcement.

B. Eliminate or Reduce Market Access Barriers

The US should induce China to eliminate its market access barriers on imported IP protected goods. These market access barriers, discussed in Part II.B.4, reduce or delay the supply of legitimate imported copies, helping to create an alternate black market for domestically-produced knockoff goods to satisfy consumer demand.¹⁴³ By eliminating restrictions on supply, consumers will have full and prompt access to legitimate copies. This should reduce the impetus for a black market of infringing copies. In addition, by reducing restrictions on the supply of legitimate copies, the "cost of goods sold" should be lower for legitimate copies. This reduction in the cost of placing legitimate copies on the market should ultimately result in lower prices for consumers. Legitimate copies will become more affordable for consumers in China. The price discrepancy between legitimate and illegitimate copies will shrink and hence, diminish relative demand for illegitimate copies.

The challenge facing this proposal is how the US can actually induce China to eliminate or reduce its market access barriers. The US may attempt: (1) bilateral negotiations with China; (2) multilateral WTO negotiations; and (3) filing a WTO complaint, alleging that China's market access restrictions violate

¹⁴³ See Part II.B.4.

provisions of the GATT. Bilateral and multilateral negotiations will require Chinese cooperation and the US to make certain trade concessions of its own. Multilateral WTO negotiations would be conducted in the context of the Doha Development Round.¹⁴⁴ The Doha Round has stalled primarily over disagreement on agricultural issues, with the US demanding developing countries such as China make reductions in tariffs on agricultural goods and developing countries demanding the US cut agricultural subsidies.¹⁴⁵ The US might therefore, either in the context of bilateral or multilateral talks, offer concessions on agricultural subsidies in exchange for China eliminating market access restrictions.

Bilateral talks between the US and China may hold more promise given the political climate that has engulfed multilateral talks in the Doha Round. The prior Uruguay Round, ending in 1995, promised developing countries a “grand bargain” whereby developed countries would open up their markets to exports from developing countries. In exchange, developing countries would take on economic and regulatory commitments, TRIPS being but one example.¹⁴⁶ Developing countries have since regarded the grand bargain as a grand betrayal.¹⁴⁷ Developed countries, through subsidies and other measures, have not increased the accessibility of their markets to exports, thus failing to hold up their end of the bargain from the perspective of developing countries. Developing countries meanwhile have saddled themselves with commitments and reforms that have produced in their view, little benefit.¹⁴⁸ The hostility developing countries have developed over the Uruguay Round is a serious barrier to any constructive exchanges of trade concessions in the ongoing Doha Round.¹⁴⁹ Developing countries will regard any attempts by developed countries to impose new commitments and trade liberalization reforms, such as reductions in market access barriers, with animosity—particularly if developed countries are unwilling, in exchange, to commit to measures (for example, eliminating

¹⁴⁴ See Roland L. Parry, *Dismayed powers plea to salvage WTO talks*, Fairfax Digital Newsbreak (July 30, 2008), online at <http://news.theage.com.au/world/dismayed-powers-plea-to-salvage-wto-talks-20080730-3myb.html> (visited May 3, 2010).

¹⁴⁵ Id.

¹⁴⁶ Shirley V. Scott, *The Problem of Unequal Treaties in Contemporary International Law: How the Powerful Have Reneged on the Political Compacts Within Which Five Cornerstone Treaties of Global Governance Are Situated*, 4 J Intl L & Intl Rel 101, 118 (2008).

¹⁴⁷ See id; see also, Justice Chimugwuanya Nwobike, *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development*, 8 Asper Rev Intl Bus & Trade L 87, 115–18 (2008).

¹⁴⁸ See William A. Lovett, *Beyond DOHA: Multipolar Challenges for a Globalized World*, 17 Tulane J Intl & Comp L 3, 19 (2008).

¹⁴⁹ See id.

agricultural subsidies) that will substantially increase the accessibility of their domestic markets to exports. Bilateral talks between solely the US and China may avoid the vitriol that embroils multilateral WTO negotiations and hold greater promise of constructive compromise that will ultimately lead to a reduction in China's market access barriers.

Filing a WTO complaint against China has the advantage of not requiring Chinese cooperation. The precise claims in the US' complaint will depend on the particular market restriction the US is attacking. For instance, the fact that China subjects only imported music to government censors might violate Article III:4 of the GATT, which bars discriminatory regulation.¹⁵⁰ Not all of China's market restrictions, however, are visible WTO violations. China's lengthy approval process for entertainment software titles applies equally to domestic and foreign titles. It is not discriminatory in any way and simply reflects poor domestic policy and inefficient administration. A WTO complaint therefore fails to pinpoint many of China's market restrictions.

The problem with reducing market access barriers is then a matter of execution or "getting there." In addition, even if China agrees to a reduction in market restrictions, this will not completely eliminate the incentive for knockoff goods. While the supply of legitimate copies will be more plentiful and affordable, knockoffs will still be sold at a fraction of the price. Demand for counterfeit copies, while diminished, will remain and a black market will still exist.

Despite these concerns, this proposal should be implemented. If the US can induce China to eliminate its market restrictions, the benefits will be immediate and significant. The stimuli for a black market are: (1) lack of or delayed supply of legitimate goods, in which case the black market provides a substitute supply of infringing copies; and (2) the discrepancy in price to consumers, since infringing copies are far cheaper. By eliminating market restrictions, the first stimulus is promptly eliminated, since there is no longer a limited or delayed supply of legitimate goods. The second stimulus of price will remain, but will be diminished because of the lower cost of placing legitimate copies onto the market. The net result is a substantial and immediate reduction in IPR infringing activity.

¹⁵⁰ General Agreement on Tariffs and Trade ("GATT") (1947), Art III:2, 55 UN Treaty Ser 187, 206 (1950). Since then, the provision has been moved to Art III:4, which provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." See Text of the General Agreement on Tariffs and Trade (July 1986), Art III:4, online at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (visited May 3, 2010).

C. Execute a Bilateral Agreement To Encourage Joint Ventures

The US should enter into a bilateral agreement with China that encourages US firms seeking to do business in China to do so via joint venture with a Chinese partner firm.¹⁵¹ Through joint ventures, Chinese partner firms will have a stake in the economic success of the venture.¹⁵² Chinese partner firms will then also have an interest in obtaining and protecting IPRs, which are vital to the profitability of the joint venture. The proposal will help cut China's "IP trade deficit" discussed in Part II.¹⁵³ While Part II classified China's IP trade deficit as a long-term cause of China's poor IPR enforcement record, an increase in joint ventures should present short-term improvement in IPR enforcement. The discussion in Part II of China's net importation of IP assumed that balancing the IP deficit would take decades, requiring a maturation of Chinese industry and technological capabilities before Chinese businesses can begin to create and take ownership of substantial amounts of IP. However, joint ventures should accelerate that process. Chinese firms would immediately take partial ownership and an economic interest in the IPRs held by their US partner firm. Further, with the help of the technical and creative expertise of their US partner, Chinese firms may increasingly develop their own IPRs. Joint ventures may also combat local protectionism.¹⁵⁴ Greater domestic ownership of IPRs means local firms and industries will shift their operations from production of knockoff goods and towards production of legitimate copies as part of their joint venture. Local Chinese governments will then shift their economic reliance on black market companies towards reliance on joint ventures who own IPRs. As a result, local governments will develop an interest in protecting and enforcing IPRs.

Both sides of the joint venture may also aid each other in enforcement of their jointly held IPRs. The US firm, with its experience in the US judicial system, may be more accustomed to filing patent applications and trademarks and copyright registrations and pursuing infringement actions aggressively. The Chinese firm may be more accustomed with the workings and tendencies of the Chinese judiciary and agencies. Joint ventures will make Chinese businesses more familiar with IP ownership and assertion of their IPRs against infringers. With a greater domestic stake in IPRs, IPR enforcement may become a national priority, one in which the Chinese government begins investing to meet international standards.

¹⁵¹ See Cornish, 9 Vand J Enter & Tech L at 434–35 (cited in note 26).

¹⁵² Id.

¹⁵³ See Part II.A.2.

¹⁵⁴ See Part II.B.2.

Market forces have already provided some incentive for joint ventures between US and Chinese companies. General Motors (GM) currently has entered partnerships with Chinese manufacturers to produce GM vehicles in China, with Chinese manufacturers taking 66 percent ownership in the combined venture.¹⁵⁵ The joint venture presents business benefits for both sides. GM can outsource its manufacturing operations (which may be costly and time-consuming to establish and operate) and Chinese manufacturers may operate more cheaply thereby saving GM expenses.¹⁵⁶ Chinese manufacturers benefit from technological transfer and sharing in the profits derived from the joint venture.¹⁵⁷ Microsoft has also gotten into the act. Starting in 2002, the US software giant has invested \$750 million in joint ventures with China's software industry and \$24 million per year over three years to develop research programs with Chinese universities.¹⁵⁸ While Microsoft's agreements do not address IPRs, Microsoft has stated that the agreement endeavors to foster Chinese development and creation of IP-protected goods. That in turn will lead to improvements in China's IPR regime.¹⁵⁹

The purpose of the bilateral agreement between the US and Chinese governments is to further promote joint ventures, providing incentives for their formation beyond those already bestowed by market forces. The bilateral agreement will contain provisions that provide comparative advantages for US and Chinese companies that form joint ventures, particularly as those advantages relate to IPRs. Hypothetical provisions include: (1) tax breaks or subsidies for joint ventures; (2) giving the Chinese firm in the joint venture at least 50 percent ownership in any IPRs held by the joint venture, at least in China; (3) exempting joint ventures from filing fees associated with applications for IP (for example, patent applications, trademark registration) and enforcement procedures (court and administrative agency filing fees); (4) any IPRs already registered with the PTO by the US half of the joint venture is automatically entitled to registration with SIPO in China; and (5) special fee-shifting or burden-shifting provisions which favor the joint venture in judicial proceedings in which a joint venture alleges IP infringement. The aims of these provisions are to increase the economic appeal of joint ventures, give the Chinese half of the joint venture a stake in the IPRs held by the venture, and to facilitate IPR ownership and

¹⁵⁵ Vivian W. Kwok, *GM Wants Bigger Piece of China Joint Venture*, *Forbes* (Jan 18, 2008), online at http://www.forbes.com/2008/01/18/gm-shanghai-automotive-markets-equity-cx_vk_0118markets04.html (visited May 3, 2010).

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ Hillary Hollingsworth, *The Quest for Thought Protection*, 1 *Bus L Brief* (Am U) 45, 50 (2004).

¹⁵⁹ *Id.*

enforcement by lowering the costs of IPR ownership and enforcement actions. These provisions will provide incentives, in addition to profit motive and market forces, for Chinese firms to assert their IPRs actively. This will reduce China's IP trade deficit and familiarize Chinese firms with the legal rights and economic benefits conferred by IPRs. Chinese businesses and the government may then come to recognize IPRs as a national priority and develop the political will to bolster their IPR enforcement efforts.

This proposal faces three objections. First, it is unclear whether many of the bilateral agreement's provisions for joint ventures are actually acceptable under WTO rules and regulations. Providing subsidies and lowering the costs of IPR ownership and enforcement for joint US-China ventures may violate the national treatment principle of the GATT,¹⁶⁰ the Agreement on Subsidies and Countervailing Measures (SCM)¹⁶¹ and TRIPS.¹⁶² Overcoming this objection could involve turning the bilateral agreement into a multilateral one, extending its incentives for joint ventures to companies from all nations seeking to do business in China. However, extending the agreement in such a manner would require the consent and support of all other nations. Some nations may find it undesirable to place foreign companies that seek to "go it alone" in China at a comparative disadvantage.

Second, it is unclear whether China would consent to such a bilateral (or multilateral) agreement encouraging joint ventures. Such an agreement would place purely domestic Chinese firms at an economic disadvantage relative to joint ventures. It would also result in lost government revenue due to subsidies, tax breaks, and waiver of fees. China would weigh these sacrifices against the benefits to Chinese industry from joint ventures such as technology transfer, increased economic output, and job creation.

Third, the US may find it objectionable that in order for US companies to do business in China, US companies are compelled by the bilateral agreement to form partnerships with Chinese firms. This reduces the autonomy of US companies to dictate how they want to do business in China. It also forces US companies to share profits and ownership with their Chinese partners. The bilateral agreement's provisions, however, are intended to make joint ventures economically appealing, through subsidies, tax breaks, and facilitation of IPR ownership and enforcement. These incentives, in addition to those inherent to joint partnerships, may provide advantages that outweigh a US company's concerns over joint ventures. Further, US companies may find that "going it

¹⁶⁰ GATT, Art III (cited in note 150).

¹⁶¹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 ILM 1125 (1994).

¹⁶² TRIPS, Art 3 (cited in note 11).

alone” is problematic, in light of lack of familiarity with the Chinese market, business regulations, government corruption, and rampant IP infringement. Forming partnerships with domestic Chinese firms may alleviate these problems. The Chinese firm will have greater understanding and experience with the Chinese market and regulations. Forming partnerships with Chinese firms may curry favor with Chinese government regulators and officials. The bilateral agreement’s provisions also help joint ventures enforce their IPRs against infringement. Overall, most US companies are likely to welcome the bilateral agreement as assisting opportunities to do business in China.

V. CONCLUSION

For the past decade, weak IPR protections in China cost US businesses tens of billions of dollars every year in lost revenue. Weak IPR protections create a considerable disincentive for US businesses seeking access to the Chinese consumer market, and account for approximately one-quarter of the politically and economically contentious US-China trade deficit. This Comment has sought to examine what measures the US can take to resolve the situation and induce China to improve its IPR enforcement. Part I outlined the scope of the problem and stated the paper’s two assumptions: first, the broad cause of China’s weak IPR enforcement is lack of willpower or concern rather than lack of law or capability, and second, that any initiatives the US undertakes to remedy the situation cannot harm US-China diplomatic and economic relations. Part II discussed the causes of China’s weak IPR enforcement record in detail, classifying those causes that are not conducive towards short-term remedy and those that are. Part III assessed proposed US measures that are unlikely to result in a significant short-term improvement in China’s IPR enforcement.

Part IV presented three measures that, if carried out as a uniform plan of action, are likely to result in a significant improvement in China’s IPR enforcement in the near future. First, the US should file a WTO complaint alleging China’s violation of Article 63.1 of TRIPS, which places minimum transparency requirements on the IPR enforcement bodies of member states. Improved transparency may cause China’s enforcement bodies to improve the competency and uniformity of their adjudications. Improved transparency also provides the US with evidentiary support to file a more substantive WTO complaint in the future under Article 41 or 61. Second, the US, either through bilateral or multilateral WTO negotiations, or by filing a WTO complaint alleging Chinese violation of the GATT, should induce China to reduce or eliminate its current market access restrictions. These market access restrictions account in large part for the vitality of China’s black market for counterfeit goods. Third, the US should execute a bilateral agreement with China providing incentives for US companies seeking to do business in China to form joint

ventures with Chinese companies. These incentives should target facilitating Chinese ownership and enforcement of IPRs. Joint ventures will reduce China's IP trade deficit and help turn IPRs into a national priority.

While this Comment proposes that initiating the three foregoing proposals as a single plan of action will present the strongest opportunity for improved IPR enforcement in China, it may be the case that complete and effective IPR enforcement is not possible in China in the short-term. It may be that for China's IPR enforcement to reach the level of efficacy found in the US or other OECD nations, China must achieve the same socioeconomic conditions as those found in OECD nations. It may be that so long as Chinese incomes are far lower than the OECD average, there will be strong consumer demand for counterfeit goods. So long as this demand exists, a black market will necessarily exist as well. Perhaps until China evens its IP trade balance or cultural attitudes regarding IP change, fully effective IPR enforcement is not possible. In addition, modernizing the Chinese judiciary and breaking down the autonomy of local municipalities might take decades, though Part II classified them as short-term causes of China's IPR problem. The core point remains. China's IPR enforcement problem may not come close to being fully resolved within a five-year period. While US measures may induce some improvement, such actions are more likely to act as a stopgap rather than complete answers.

Finally, this Comment conducted a sweeping review of China's IPR problem as it currently stands, surveying causes and proposed solutions. This Comment does not provide definitive logistical details on how to implement various proposed measures. For instance, this paper leaves open what precise provisions and incentives should be included in a bilateral US-China agreement encouraging joint ventures. Many proposals and arguments are couched as possibilities and probabilities contingent on unknown facts.¹⁶³ This Comment thus acts only as a starting point, providing a preliminary examination of various proposals mostly found in the existing literature. Additional investigation into these proposals is recommended. In particular, it would be valuable to conduct an analysis of Chinese judicial and administrative agency rulings and remedies in IPR cases, compiling statistics to adjudge the exact failings of these enforcement bodies and whether these institutions exhibit discrimination against foreign parties in violation of the national treatment principle.¹⁶⁴ Such data, however, is hard to collect, which is why the paper advocates strongly for filing an Article 63.1 complaint. Through more vigorous future investigation, the US will gain a clearer picture of what actions hold the most promise in improving China's IPR enforcement record.

¹⁶³ See Part III.D; Part IV.A.

¹⁶⁴ See Part III.D.

